# ECONOMIC REFORM OF THE LEGAL PROFESSION

## Speech to the University of Queensland Economics Alumni and Law Graduates Association

**12 October 2000**

In 1995 I helped organise a Law Council biennial conference in Brisbane. It was attended by numbers of overseas lawyers including several Irish barristers. In those days I may have been even more serious about economic reform of the legal profession than I feel this morning. The Bars in Queensland, New South Wales and Victoria had just been through an overhaul of our ethical rules designed to establish a national standard and to comply with the law and the spirit behind the anti-competitive provisions of the *Trade Practices Act*. I was familiar with the language of economic reform. Our Association had been changing or considering a variety of changes to our rules for several years. Structural reform of the legal profession in Queensland was – as now – the subject of discussion by government. In my comments I hope to give you a brief overview of some of the changes that have occurred in the last ten years or are planned for the near future.

I shall then introduce you to an argument that the market for lawyers distorts the justice system and that one way out of that problem is to have a divided rather than a unified legal profession.

Not long after I became a Queen's Counsel in 1989 the Bar Association abolished what some of you will remember as the two counsel and the two-thirds rules. Until then QCs had to appear with a junior who charged two-thirds of the silk's fee. We could do opinions without a junior and appear in tribunals or in criminal cases by ourselves. The Association took the initiative to abolish these rules through its committee. The motion was carried easily. I think that happened essentially because our members recognised the difficulty of using relatively arbitrary rules to define the work that would benefit from the attention of a senior, experienced and talented barrister.

I mentioned the Irish barristers. One afternoon during that 1995 conference I sat down in a group of lawyers and met one of the Irishmen. He was a man with a degree of irreverence for economic rationalism. He told me about the Irish three counsel rule. Now I had heard of it before but took the version I was given with a pinch of salt. It sounded like an Irish joke. If you wanted to brief silk in Ireland the solicitor had to engage two silks and a junior. The rationale was that the silks were so busy that you had to engage two to ensure that one turned up – or to put it in a more Irish way – to be sure, to be sure.

In the event of a trial going ahead only one silk would attend but would share the fee with the other. I gather that particular restrictive practice has not survived Ireland's membership of the European Union.

Our two counsel rule was not without a plausible rationale. It made it a real challenge to become a silk such that those without the necessary ability would be unlikely to apply. You put behind the run of the mill paperwork associated with being a junior barrister and limited yourself to writing difficult opinions and appearing in demanding cases that should have needed the services of two counsel. It was like starting in practice all over again and carried many of the same anxieties. You had to have sufficient confidence in your abilities to carry it off. The Chief Justice, in recommending barristers for silk, should have believed that they would bring distinction to the role and provide a very high standard of service to the clients who used them. The aim was and, I believe, should be, to identify publicly those barristers of high standing and achievement who members of the public can be confident will be able to conduct difficult matters well and provide sound advice about the law and litigation. The ACCC has accepted in the case of New South Wales that that is the purpose of their rules - that it is not an exclusionary rule designed to lessen competition.

Now the reshaping of the rules about work to be done by silks is just one example of change in the internal arrangements of the legal profession in modern times. Many of the changes have been initiatives of the profession. The profession's national body, the Law Council of Australia, has taken the initiative in developing:

- uniform admission rules
- model rules of professional conduct
- uniform trust account rules
- a model *Practice Of Foreign Law Bill* to allow overseas trained lawyers to practice foreign law in Australia – something now permitted in all jurisdictions except Queensland and Western Australia
- a "travelling" practising certificate regime which when fully implemented will facilitate the development of a national legal services market by removing constraints which have precluded unrestricted practice throughout Australia

The travelling practising certificate regime is now in force in New South Wales, the Australian Capital Territory, Victoria and South Australia and is soon to commence in the Northern Territory and Tasmania. We hope that the changes in the regulation of the profession planned for Queensland will include similar provisions. This will mean that practitioners from any of these jurisdictions will be able to practice in any of the other jurisdictions without an additional practising certificate and without additional professional indemnity insurance provided that an office is not established outside the practitioner's home jurisdiction. These arrangements will succeed the current mutual recognition

scheme which facilitates interstate recognition of professional qualifications and practising rights.

Another area of current interest to the Law Council that depends on State legislation for any change to occur is the question whether solicitors' firms should be able to incorporate or become part of a multi-disciplinary practice. New South Wales will now allow lawyers there to practice in that fashion. Western Australia is planning such legislation while there are limited rights to incorporate in Victoria, South Australia, Tasmania and the Northern Territory. The ownership structures of legal firms are also a subject for discussion in the Green Paper released in Queensland about structural changes in the profession here.

The Law Council supports these proposals but it is fair to say that many of its constituents are anxious that the introduction of such changes should not erode the lawyers' ethical obligations to their clients and to the courts. One contribution I would like to make to the debate about multi disciplinary practices is to raise the question whether it is practical for firms to become one stop shops or if they would be better positioned to form temporary alliances for particular cases or projects? The former US Secretary of Labour, Robert Reich, in his book, *The Work of Nations : Preparing Ourselves for 21st Century Capitalism*, saw the future of work more in the formation of such alliances. Is there really a future for

conglomerate firms of consultants that cross the boundaries of all the disciplines that the law now touches? Would all those differing cultures meld? Will the temptation be too great to refer only to other professionals within the firm rather than better qualified outsiders? Or should lawyers stick to their knitting, forming alliances with other professionals only when needed?

I also believe there is a real concern that lawyers' core values may be eroded if their firms are transformed into corporations whose only objective is to make money. This is a view shared by many American lawyers. In America they have, so far, resisted pressure to change their structures in that fashion. They are concerned that if they do have incorporation that the corporate service providers remain ethically sound and focussed on the profession's core values. We should be also.

Many of the changes recommended by the Law Council, particularly since its 1994 "Blueprint for a National Legal Services Market", require statutory changes in the various jurisdictions in Australia.

One of the subjects of concern to solicitors in Queensland is whether conveyancing should be opened to non-lawyers such as licensed conveyancers. That is a lengthy debate that I do not wish to enter on now. Other significant changes affecting barristers have been made by professional associations - the

abandonment of the rules prohibiting direct briefing of counsel by non–solicitors in Queensland, New South Wales and Victoria, the abandonment of the two counsel and two thirds rules to which I have already referred and the abandonment of rules compelling barristers to practice from premises approved by the Bar.

There have also been changes to rules prohibiting lawyers from advertising so that, generally speaking, the only advertising that is currently prohibited is that which is vulgar, sensational or otherwise would or could bring the court or the profession into disrepute. Advertising can include the advertising of specialties and areas of special interest and some associations, including the Queensland Law Society, have approved schemes to accredit legal practitioners as specialists in particular fields.

There has always been a competitive market for professional indemnity insurance for barristers. Whether there should be a similarly competitive market for insurance for solicitors is also a topic for discussion in the current Green Paper.

Many of the changes to rules affecting the profession have been effected in consultation with the ACCC such as the model rules adopted by the Bar Associations in Queensland, New South Wales and Victoria. There remain,

however, areas of disagreement between the ACCC and the profession as well as areas of misunderstanding. The recently released National Competition Council community information paper which suggests that the legal profession still engages in anti-competitive practices is an example. One of the statements in that document related to barristers but referred to anti-competitive practices that had been reformed nearly 10 years ago and, in the case of the setting of minimum fees by bar associations, did not exist in Queensland.

I understand, also, that the ACCC is currently involved in negotiations with the Western Australian Bar Association about certain of its rules, among them the sole practice rules. These require barristers to practice as individuals, not in partnership or as employees. The object is to ensure the continuance of the "cab-rank principle" which requires a barrister to accept briefs from solicitors in a field in which the barrister practices. The object of that rule is to ensure that even the most unpopular litigant can expect proper representation. It also has the effect of creating a competitive pool of experienced advocates who are not as inhibited from appearing for or against particular clients as they would be if they were members of firms prevented by conflicts of interest or other concerns from acting for particular clients. We regard the rule as an essential feature of our law articulated by Thomas Erskine's famous words when he justified his defence of Tom Paine in the 1790s:

> "From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the Court where he daily sits to practice, from that moment the liberties of England are at an end."[1]

If the ACCC believes the sole practice rule is anti-competitive, a rule that is voluntarily adopted only by those who wish to practice as independent barristers, then it should surely accept that it is critical to the public interest in maintaining adequate safeguards between the citizen and the state. If it were abolished then its absence may also narrow the market for legal services rather than broaden it, a theme that I shall develop shortly.

Now that is the very brief, broad brush overview of developments in the regulatory regime covering Australian lawyers in the recent past.

Although much of the regulatory change or proposed change is intended to bring about the object of economic reform, in my view, the aim of developing a perfectly competitive market for legal services is only partly effected by liberalising the structures of the legal profession. In so far as any changes may encourage only one form of legal practice – in larger firms or corporations – they may have the opposite effect of that intended.

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1 *Rondel v. Worsley* [1969] 1 AC 191, 275.

There is a good discussion of many of the issues in an enlightening recent article by Professor Gillian Hadfield. It was drawn to my attention by Justice Margaret McMurdo, the President of the Court of Appeal. The article is entitled "The Price of Law: How the market for lawyers distorts the justice system"[2].

Professor Hadfield identified three basic elements supporting the structure of the market for lawyers – the complexity of law, the monopoly the state has over coercive dispute resolution and the unified nature of the profession.

In referring to the complexity of the legal process she highlights the emphasis placed by the system upon the provision of individual consideration to the particular litigants, the professional obligation of lawyers to act on the basis of their clients' interests and not their own, the ambiguity of the law and the unpredictable results of individual disputes. The incentive to engage the best lawyer possible because of the "winner takes all" results common in most litigation and some commercial negotiations leads to a significant difference in value between a lawyer who is good and one who is marginally better.

In examining these issues she points out that there is a different result in the valuation of legal work where it is not characterised by deep uncertainty. Routine, standardised work such as drafting simple wills, obtaining uncontested

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[2] (2000) 98 Michigan Law Review 953.

divorces, and simple cottage conveyancing in a non-adversarial setting leads to low flat fees, consumer oriented legal plans, and multiple providers whose incomes are not particularly high[3].

Professor Hadfield also refers to natural barriers to entry, particularly in respect of the handling of difficult legal matters, not just litigation but commercial representation. There the development of experience and the possession of natural talent leads to a "naturally" limited supply of potential high end lawyers who are categorically, not just marginally, better than the rest and who can command fees driven by the wealth of potential clients, not the opportunity cost of supply "This is the characteristic of the monopolised, not competitive market," she says. "The key point is that the source of the monopoly is the 'natural' barrier of the scarce availability of the cognitive skills necessary to engage in complex legal reasoning"[4].

The state monopoly on coercive dispute resolution to which she refers is relevant in the context that it is <u>that</u> monopoly which establishes the value of access to the legal system and hence the surplus at risk of extraction by lawyers. The legal system as a system is largely immune to pressures to reduce costs – those with

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3 Ibid at 976.
4 Ibid at 992.

disputes have no coercive alternative to the costly system if they are plaintiffs and no choice at all if they are defendants.

> "The autonomy of law, [and I quote] is, in very important respects, that of an institution that can establish its own values – the importance of due process or refined distinctions between cases for example – without pressure to take into account an important value for participants in the system: the cost of participating. This is not a criticism of the ethics of the profession. It is a fact about the nature of institutions that are driven largely by internal logic rather than by the need to respond to outside pressures and demands."[5]

In other words there is no market for legal systems or coercive mechanisms.

In considering the effect on the justice system of these conclusions Professor Hadfield points out[6] that when the American "legal system relies on the market allocation of lawyers under conditions of complexity, monopoly and unification, it chooses the management of the economy over the justice of social and political relationships as its central preoccupation. It establishes the governance of the economy as the principal role of the justice system".

Her tentative suggestions for reform focus on how the legal system might be restructured so as to reconcile the achievement of legitimate economic goals with more fundamental goals of justice.

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5 Ibid at 993.

Reducing complexity in the law may be one way to reduce the distortions in the system. It is easier to advocate simplification, however, than to achieve it.

The State's monopolistic control over the power of coercion in favour, for example, of unreviewable arbitral awards may lessen lawyers' ability to profit from monopolies but at the expense of the protection of rights and the social order. "Eliminating the state's monopoly over force is equivalent to undoing the social contract"[7].

Her main hope for change is to abandon the concept of the unified legal profession as it operates in the United States and Canada. She expresses it in terms of preparing students to work in corporate law as compared to working in the justice system. Her "disaggregation" of the profession into commercial lawyers and those concerned with private rights, does not strike me as a particularly healthy approach to the enforcement of the social contract amongst members of our society. Nor does she pay sufficient regard to the existence of legal firms whose main areas of practice do lie in the protection of individual rights – firms that practise in criminal law, family law, industrial law, immigration and administrative law.

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6 Ibid at 1000.
7 Ibid at 1003.

The concept of laying part of the blame for the lack of a perfect market on the unified nature of the legal profession in America and Canada, however, interests me as an economic justification for what I believe is a useful functional division of our legal profession into barristers and solicitors. Barristers specialise in advocacy, the conduct of litigation and the provision of independent advice about litigation and the law, taking advantage of their close knowledge of the courts through regular appearances there and the sharing of chambers with other barristers with similar specialised knowledge. Solicitors practise and often specialise in many of the far wider fields associated with transactions, the provision of advice across a wide range of human endeavour as well as the preparation and sometimes the presentation of matters for litigation.

Barristers can be and are called on to act for corporations or individuals. There are many who practise in the commercial area but there are other large groups within the Bar devoted to individual rights issues such as arise in criminal law and family law, defamation and other tortious disputes. Traditionally our fees have been charged per item of work performed rather than on an hourly rate, although that has changed significantly in recent decades. The cost structure of running barristers' chambers is also normally much less than that associated with solicitors' firms. There are many fewer employees and less space needed. We do not have trust accounts and our professional indemnity insurance is much cheaper. This illustrates the point that where there are different professional

structures available then the cost of some services available to the public may be significantly less than would otherwise be the case.

I do not pretend, however, that this means that our system leads to a perfect market. The problems that stem from complexity in the law and the demand for the best legal talent to deal with that complexity will continue to have the effect that the demand for the best practitioners in disputes where the winner takes all or where specialised knowledge of a transaction is of great importance will permit and encourage the charging of high fees. The fact that many simple transactions and much straightforward litigation can be performed at quite modest rates will be obscured in the public eye by the effect of the very high fees charged for the most difficult work. There is a reasonable argument, however, that the promotion of different styles of practice of the law will have some ability to remove the temptations arising from monopolistic access to the only coercive system of justice in the state.

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